analysis "trustworthiness" is the prime determinate. Experience demonstrates that a declaration of pain, made while a declarant is suffering, is more likely to be sincere and accurate. The circumstances are such as to render the declarant incapacitated, to some degree, to plan a falsification. Hence the admissibility of this kind of evidence depends upon whether the pain or suffering is contemporaneous or co-existing with the declaration. *Rogers v. Crain, supra; Newman v. Dodson,* 61 Tex. 91 (1884). It is submitted, that in following this rule the principal case is applying a sound limitation on the admissibility of such evidence in requiring that such declaration be spontaneous and a limitation that has been fairly uniformly adhered to by the Texas courts. Apparently this rule has been incorrectly applied in some instances. *St. Louis Southwestern Ry. v. Norvell,* 115 S. W. 861 (Tex. Civ. App. 1909, writ of error refused); *International & G. N. Ry. v. Lane,* 127 S. W. 1066 (Tex. Civ. App. 1910). A criticism of these cases is probably not justified, due to the failure of the opinions to adequately disclose the circumstances which accompanied the declarations.

J. W. M. Jr.

EVIDENCE—JUDICIAL NOTICE—NO "PRESUMPTION" AS TO FRACTIONAL VALUE OF UNDIVIDED INTEREST.—Kishi sued the Humble Oil Company for damages for loss in market value of his three-quarters undivided interest in an oil and gas lease upon which the Humble had drilled a dry hole, after the expiration of a lease executed by Kishi and his cotenant, the drilling being with the consent of the cotenant, but over Kishi's protest. The trial court and Court of Civil Appeals gave judgment for defendant (261 S. W. 228 (1924)), but the Commission of Appeals reversed these judgments and rendered a judgment for $37,500 for Kishi (276 S. W. 190 (1925)), being three-fourths of the total value of the lease as found by the two lower courts. Upon second motion for rehearing the Commission of Appeals reversed its former decision and remanded the case to the district court, with instructions to ascertain the value of the three-quarters undivided interest, saying it did not feel justified in presuming that a three-quarters undivided interest in an oil and gas lease is worth exactly three-fourths of the total value of the lease. *Humble Oil and Refining Co. v. Kishi,* (Tex. Comm. App. 1927, not yet reported).

This is apparently a matter of first impression in Texas, and no authorities are cited to support the decision. If in saying it will not "presume" that a three-quarters undivided interest is worth three-fourths of the total value of the lease the court means it will not make a conclusive presumption to that effect, the question is really one of judicial notice, and the decision amounts to saying that the court will not judicially notice the value of undivided interests. It is more probable, from other language in the opinion, that the court means this is a fact which may be inferred from other facts, or may be proven, and that it will not as an appellate court make this fact inference, but will leave it to the trial court to find this fact, either by inference or from evidence. In either light the holding seems sound. An undivided interest is usually worth less than its fraction of the total value of the lease, because the purchaser is uncertain as to what action the other cotenant may take in the development of the lease, and as to when the other cotenant may exercise its statutory right of partition. Art. 6082, TEX. REV. CIV. STAT. (1925).

No change is made in the original holding on the merits of the case. See (1926) 4 TEXAS LAW REVIEW, 215 for an extended criticism of the decision awarding Kishi damages. The court overrules defendant's contention that is was rightfully on the land under authority of one cotenant, saying

that its entry "was unlawful, not because it had no right to make entry, but because the entry made was in denial of Kishi's right."

V. E.

ADDENDUM.—This is not the first time that a turn of a phrase has decided a case. A good sounding sentence very frequently obscures the problem under consideration. The court says defendant's entry "was unlawful not because it had no right to make entry but because the entry made was in denial of Kishi's right." This puts an entirely new face on the problem. Defendant is thus admittedly in rightful possession of the land and was not a wrongdoer in conducting drilling operations. But defendant's wrong consisted in denying Kishi's "right" (presumably Kishi's right of entry and right to drill). Assuming this to be correct, the question then arises: What was it that *caused* Kishi's damages? Was it the denial of Kishi's right of entry, etc., or was it the drilling of the dry hole by defendant in pursuance of its admitted right to prosecute drilling operations? Clearly the market value of Kishi's interest in the lease was destroyed by the latter. Hence under the court's hypothesis the problem becomes one of causal relation, and on such basis it would seem that defendant should have had judgment.

After all is said it would seem that the only problem in the whole case was whether this sort of risk (a fall in market value of the lease) is one which a cotenant in possession takes when he denies in good faith the possessory claim of another cotenant. Is such risk protected against by the rule at the basis of the common law action of trespass as invoked in the case at hand? Prior to this decision such had never been the law. If the law is to be extended thus far it should have been done upon a more articulate basis than is reflected in the opinions of the court. The processes by which new boundaries are given to legal rules such as here involved ought to be made clear and not left to the turning of dubious phrases. Any injustice that may fall upon the defendant is not the only bad result that ordinarily may be expected to follow such a decision.

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JURISDICTION—INTEREST AS AMOUNT IN CONTROVERSY.—Plaintiff sued in the district court to collect the sum of $384.75, balance due an estate by a guardian according to the finding of the probate court, plus ten per cent interest (for a period of more than ten years) allowed by art. 4189, TEX. REV. CIV. STAT. (1925) where guardian neglects to invest surplus money in his charge. *Held*, the district court had jurisdiction because the interest allowed by Art. 4189 is "of the nature of damages fixed by law to compensate for the loss conclusively presumed to ensue from the guardian's breach of duty." *Holman v. Ward*, 288 S. W. 148 (Tex. Comm. App. 1926).

The interest which is to be excluded from the amount in controversy in determining jurisdiction of courts under art. V, sections 8, 16 and 19, Constitution of Texas, and Arts. 1819, 1821, 1906, 1949, 1950 and 2385, TEX. REV. CIV. STAT. (1925), is interest *eo nomine*, i. e., conventional interest, expressly provided for by the contract of the parties; or, interest allowed by statute as compensation for the use or detention of money. *Ibid.*, Art. 5069; *McDaniel v. Nat. Steam Laundry*, 112 Tex. 54, 244 S. W. 135 (Tex. Comm. App. 1922). Except that expressly provided for by contract, this kind of interest is purely a creation of statute. *Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. 366 (1887); *Escue v. Hartley*, 202 S. W. 159 (Tex. Civ. App. 1918). But this refers only, it seems, to the interest allowed on a sum payable and ascertained under a written contract, interest on an open account, under art.